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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/797,490	03/10/2004	Virgil E. Stanley III	4486-096	5656

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1400 Crescent Green, Suite 300
Cary, NC 27518

EXAMINER

AUSTIN, AARON

ART UNIT	PAPER NUMBER
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1775

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	03/19/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary

Application No.

10/797,490

Applicant(s)

STANLEY, VIRGIL E.

Examiner

Aaron S. Austin

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 September 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,5-10,12,13 and 15-29 is/are pending in the application.
- 4a) Of the above claim(s) 10,12,13,15-17 and 27-29 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,5-9 and 15-29 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 7-9, and 18, 19, 22, 23, 25, and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bigman (U.S. Patent No. 6,696,116) in view of Davis et al. (U.S. Patent No. 5,455,750).

Bigman teaches a device and method for flowing pellets that may, for example, simulate snowfall on a tree (abstract and column 2, lines 1-4). The device includes a hollow trunk, branches extending from the trunk, pellets/blocks held in a container associated with the tree, and a blower/fan configured to generate upward movement of the pellets through at least a portion of the trunk to an outlet (column 2, lines 27-65).

Bigman does not teach the pellets as having a fragrance.

Davis et al. teach an artificial holiday tree incorporating a scent-producing element therein in the form of scent producing pellets or potpourri (column 5, line 35). Therefore, as it is clearly taught by Davis et al. that scent producing pellets associated with a tree may provide the benefit of desirable scents associated with the tree or a holiday such as Christmas, it would have been obvious to one of ordinary skill in the art at the time of the present invention to impart a scent to the pellets taught by Bigman.

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Thus the claimed invention as a whole is *prima facie* obvious over the combined teachings of the prior art.

Claims 5, 6 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bigman (U.S. Patent No. 6,696,116) in view of Davis et al. (U.S. Patent No. 5,455,750), and further in view of Zins (U.S. Patent no. 5,517,390).

Bigman teaches a device and method for flowing pellets as described above.

Davis et al. teach an artificial holiday tree incorporating a scent-producing element as described above.

Neither Bigman nor Davis et al. teach the fan being disposed within the trunk.

Zins teaches a fan disposed within the trunk of an artificial tree used to cool the interior of the main trunk by circulating air therein (column 4, lines 49-52). Therefore, as it is clearly taught by Zins that placement of a fan within the trunk of an artificial tree provides the benefit of blowing air within the trunk, it would have been obvious to one of ordinary skill in the art at the time of the claimed invention to position the blower/fan in the device taught by Bigman in view of Davis et al. to place the blower/fan in the trunk to provide the necessary flow of air within the trunk. Thus the claimed invention as a whole is *prima facie* obvious over the combined teachings of the prior art.

Claims 21 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bigman (U.S. Patent No. 6,696,116) in view of Davis et al. (U.S. Patent No. 5,455,750), and further in view of Hashino (JP 405306833 A).

Bigman teaches a device and method for flowing pellets as described above.

Davis et al. teach an artificial holiday tree incorporating a scent-producing element as described above.

Neither Bigman nor Davis et al. teach passage of blown air through at least a portion of the hollow trunk and out the trunk and branches.

Hashino teaches an air conditioning device formed in the shape of a tree wherein heated or cooled air is passed through the trunk and out of the trunk and branches (Fig. 1). Therefore, as Hashino clearly teaches passage of air through the trunk and out a plurality of openings in the branches of an artificial tree provides the advantage of balancing the exit of air around the tree, it would have been obvious to one of ordinary skill in the art at the time of the claimed invention to pass the air-pellet mixture of Bigman in view of Davis et al. through the trunk and out the branches.

Response to Arguments

The newly executed oath filed on 10/24/06 is acknowledged.

Applicant's arguments filed 9/11/06 have been fully considered but they are not persuasive.

Regarding the combination of the Bigman reference in view of Davis, applicant first argues the term "trunk" has been misconstrued in the rejection. In support of this argument, applicant points to the definition of a trunk as "the main woody axis of a tree".

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However, a more accurate definition would be “the axis of a tree” as not every try includes woody parts (see applicant’s application for example). This definition is supported by Merriam-Webster online which defines a trunk as “the main stem of a tree apart from the roots” or “the central part of anything; specifically, the shaft of a column or pilaster” (see www.m-w.com). Thus, in reading the term in its broadest interpretation for analysis of the claim, the tube 16 does fall within the definitions of “trunk” (Fig. 4).

Even further, it would have been obvious to one having ordinary skill in the art at the time the invention was made to combine the tube 16 and support 14a of Bigman into a single trunk, since it has been held that the use of a one piece construction instead of the structure disclosed in the prior art would be merely a matter of obvious engineering choice. *In re Larson*, 340 F.2d 965, 968, 144 USPQ 347, 349 (CCPA (1965)).

Second, applicant argues the proffered motivation to combine the reference is unsupported and conclusionary. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Davis teaches the desirable benefit of adding scent to an artificial tree. Therefore, as it is clearly taught by Davis et al. that scent producing pellets associated with a tree may provide the benefit of desirable scents associated with the tree or a holiday such as

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Christmas, it would have been obvious to one of ordinary skill in the art at the time of the present invention to impart a scent to the pellets taught by Bigman.

Regarding the combination of the Bigman reference in view of Davis and further in view of Zins, applicant argues the motivation to combine the references is unsupported and wrong. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Zins teaches a fan disposed within the trunk of an artificial tree used to cool the interior of the main trunk by circulating air therein (column 4, lines 49-52). Therefore, as it is clearly taught by Zins that placement of a fan within the trunk of an artificial tree provides the benefit of blowing air within the trunk, it would have been obvious to one of ordinary skill in the art at the time of the claimed invention to position the blower/fan in the device taught by Bigman in view of Davis et al. to place the blower/fan in the trunk to provide the necessary flow of air within the trunk.

Even further, it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the blower of Bigman within the trunk, since it has been held that the use of a one piece construction instead of the structure disclosed

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in the prior art would be merely a matter of obvious engineering choice. *In re Larson*, 340 F.2d 965, 968, 144 USPQ 347, 349 (CCPA (1965)).

With respect to applicant's argument that the references teach away from each other as Davis teaches heating the fragrance pellets while Zins teaches a cooling fan, the argument is unconvincing. More particularly, the Davis reference is used to teach the obviousness of adding fragrance to the pellets of Bigman. Zins is used to teach the obviousness of placement of the blower of Bigman within the trunk as being an effective method for producing airflow within the trunk. Thus neither reference is relied upon in relation to heating or cooling processes. One of ordinary skill in the art would recognize the advantages provided by the references with respect to the teachings of Bigman. Whether the fragrance is produced by heat or not is an issue not commensurate with the claims.

Regarding the combination of the Bigman reference in view of Davis and further in view of Hashino, applicant argues Hashino is nonanalogous art. In response to applicant's argument that Hashino is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, Hashino is relevant to the distribution of air through an artificial tree. As Hashino clearly teaches passage of air through the trunk and out a plurality of openings in the branches of an

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artificial tree provides the advantage of balancing the exit of air around the tree, it would have been obvious to one of ordinary skill in the art at the time of the claimed invention to pass the air-pellet mixture of Bigman in view of Davis et al. through the trunk and out the branches.

With respect to applicant's argument that the references teach away from each other as Davis teaches heating the fragrance pellets while Hashino teaches an air conditioning system, the argument is unconvincing. More particularly, the Davis reference is used to teach the obviousness of adding fragrance to the pellets of Bigman. Hashino is used to teach the obviousness of passage of air through the trunk and branches of Bigman as an effective method for balancing the exit of air around the tree. Thus neither reference is relied upon in relation to heating or cooling processes. One of ordinary skill in the art would recognize the advantages provided by the references with respect to the teachings of Bigman. Whether the fragrance is produced by heat or not is an issue not commensurate with the claims.

Conclusion

The following is a list of prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Williams (US 3,544,783) is directed to an artificial tree. This reference was cited in applicant's Petition to Make Special but has not appeared on the record as cited art in the IDS or by the Examiner.

Burnbaum (US 4,076,234) and Chu (US 4,962,922) are directed to devices for circulating artificial snow about a tree.

Damiano (4,330,953) is directed to a pneumatic Christmas tree display wherein air is driven by a fan located in a hollow trunk of the tree.

Wilcox, II (US 5,342,611) is directed to a folding artificial Christmas tree. This reference was cited in applicant's Petition to Make Special but has not appeared on the record as cited art in the IDS or by the Examiner.

Brown, III (US 6,566,416) relates to a fragrant thermoplastic snow material. This reference was cited in applicant's Petition to Make Special but has not appeared on the record as cited art in the IDS or by the Examiner.

Masuda (JP02001327820A), and Kuwabara (JP407024047A) are directed to air cleaning devices in the form of plants wherein air is circulated through the trunk of the plant.

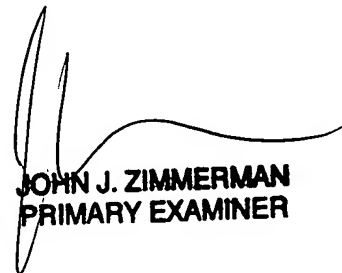
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Aaron S. Austin whose telephone number is (571) 272-8935. The examiner can normally be reached on Monday-Friday: 7:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jennifer McNeil can be reached on (571) 272-1540. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

ASA



JOHN J. ZIMMERMAN
PRIMARY EXAMINER